FOR ARGUMENT

Supreme Court, U.S.
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No. 91-5843

In The

Supreme Court of the United States

October Term, 1991

DENNIS SOCHOR,

Petitioner,

vs.

PRINTED COPY

STATE OF FLORIDA,

Respondent.

On Writ Of Certiorari To The Supreme Court of Florida

REPLY BRIEF FOR PETITIONER

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I. INADEQUACY OF APPELLATE REVIEW

A. As an initial matter, Mr. Sochor notes that the state's brief considerably simplifies the issues as follows:

First, the state has not contended that the Supreme Court of Florida reweighed sentencing circumstances.

Second, the state has not disputed Mr. Sochor's contention that, had there been a life verdict, Florida law would have required a life sentence.

Third, the state has agreed at page 19 of its brief that the *Tedder*[1] doctrine applies to death verdict cases: that is, that under *Grossman v. State*, 525 So.2d 833 (Fla.), *cert. denied*, 489 U.S. 1071 (1989), the trial court must give great deference to the death verdict in reaching its sentencing decision. The parties are in agreement as to the centrality, as a matter of law, of the penalty verdict in Florida's death sentencing scheme.

Fourth, the state has in effect agreed at page 7 of its brief that the state supreme court's appellate review differs substantially depending on whether there has been a life verdict.

Fifth, the state has not disputed that, under *Parker v. Dugger*, 111 S.Ct. 731 (1991), harmless error review is required where the state supreme court has struck an aggravating circumstance.

B. The state's argument is that the state supreme court's harmless error analysis was constitutionally adequate. Although the state agrees that the supreme court's

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[1] *Tedder v. State*, 322 So.2d 908 (Fla.1975).

review was highly deferential (state's brief, page 24: "the Court properly refused to second-guess the trial court's written order" respecting mitigation),[2] the state contends that the court's harmless error analysis was sufficient. In making this contention, the state does not explain how the Supreme Court of Florida's analysis differed from that of the Mississippi Supreme Court in *Clemons v. Mississippi*, 494 U.S. 738 (1990), or that of the Supreme Court of Florida in *Parker*.[3] Further, since the parties agree that, through *Grossman*, the *Tedder* rule of great deference to the penalty verdict applies equally to life recommendations and to death recommendations, adequate harmless error analysis requires examination of the effect of the error on the jury. Under *Yates v. Evatt*, 111 S.Ct. 1884 (1991), therefore, the reviewing court must consider all of the evidence presented to the jury. This the supreme court did not do. Hence, its decision at bar cannot stand.

C. To the extent that the state argues at page 12 of its brief that the state court reverses only where an error affects the evidence before the jury, it simply ignores

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[2] The state has not disputed that the supreme court's review of findings regarding aggravating circumstances in death recommendation cases is similarly deferential. *See Wickham v. State*, 16 Fla. L. Week. S777 (Fla. Dec. 12, 1991) (abuse of discretion standard applies to review of determination of aggravating circumstance). Florida's abuse of discretion standard requires affirmance except where the judge's decision is "arbitrary, fanciful, or unreasonable." *Canakaris v. Canakaris*, 382 So.2d 1197, 1203 (Fla.1980).

[3] Insofar as the state relies on *Walton v. Arizona*, 110 S.Ct. 3047 (1990) to avoid *Clemons*, it ignores the fact that Arizona is not a "weighing" state so that *Clemons* does not apply to it. *See Richmond v. Lewis*, 948 F.2d 1473 (9th Cir.1990).

cases such as *Stewart v. State*, 558 So.2d 416 (Fla.1990). In *Stewart*, the defense presented testimony that the defendant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired, but that the impairment was not "substantial."[4] Although the jury was instructed that it could consider all nonstatutory mitigating circumstances,[5] the supreme court reversed, holding that the trial court had erred by not instructing the jury on the statutory circumstance of substantial impairment. Thus, although the error affected neither the evidence presented to the jury nor the jury's consideration of the evidence, the court ordered reversal solely because there was one less *circumstance* for the jury to consider.

Stewart rests on the proposition that the Florida jury weighs circumstances rather than evidence. The court reaffirmed this approach in *Dougan v. State*, 17 Fla. L. Week. S10 (Fla. Jan. 2, 1992). There the court rejected Dougan's argument that the jury can render a life verdict even where it finds sufficient aggravating circumstances to justify a death sentence and insufficient mitigating circumstances to overcome them. Noting that the statutory scheme of sentencing circumstances restrains and restricts the jury's discretion, the court said that Dougan's argument would allow the jury "to disregard the statutory directions and guidance" so as to "engender

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[4] Substantial impairment of one's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law is a statutory mitigating circumstance under section 921.141(6)(e), Florida Statutes.

[5] 558 So.2d at 422 (Grimes, J., dissenting).

arbitrariness and capriciousness in jury recommendations." *Id.* S11.

II. "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING CIRCUMSTANCE

A. Again, the state has substantially narrowed the issue by its agreement concerning the importance of the jury in Florida capital sentencing proceedings. Further, the state has not contended that the language of the "heinous, atrocious or cruel" aggravating circumstance is facially constitutional. The state seems to agree that the circumstance is constitutional only to the extent that the state court hews to the *Proffitt*[6] construction (or at least the *State v. Dixon*[7] construction).[8]

B. At footnote 24 of its brief, the state contends that Mr. Sochor was precluded from challenging the jury instruction on appeal and that the only question preserved for appeal was whether the heinousness circumstance was proven beyond a reasonable doubt. It further asserts there that he was barred from arguing "whether Florida applies its HAC aggravating factor in a constitutional manner based on the instruction given." See also footnote 32 of the state's brief. However, the state makes no explicit argument that the Supreme Court

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[6] *Proffitt v. Florida*, 428 U.S. 242 (1976).

[7] 283 So.2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943 (1974).

[8] The state also apparently agrees that there was no evidence that Mr. Sochor dragged Ms. Gifford from the truck. See the state's discussion of the facts at page 23 of its brief.

of Florida declined to reach the merits of the jury instruction issue; nor can such an argument be made.

The Supreme Court of Florida would be astounded to learn that it did not reach the merits of the jury instruction issues. It has twice ruled, in the state's favor, that Mr. Sochor's case decided those issues on the merits. *See Dougan v. State*, 17 Fla. L. Week. S10, S13, n. 3 (Fla. Jan. 2, 1992) ("Several issues have been decided adversely to Dougan's contentions: 1) adequacy of instructions on aggravating factors, *e.g., Sochor v. State*, 580 So.2d 595 (Fla.), *cert. granted*, 112 S.Ct. 436 (1991). . . . "), and *Henry v. State*, 586 So.2d 1033, 1038, n. 13 (Fla. 1991) (citing *Sochor* for the proposition that "[r]ejection of these [penalty phase jury] instructions has been upheld in other cases") *cert. filed* (Jan. 28, 1992). Further, the state supreme court ruled directly on the merits of Mr. Sochor's constitutional arguments respecting the constitutionality of the heinousness circumstance. JA 382. Thus the state's footnote arguments are completely insupportable.

B. On the merits, the state's argument is twofold. It asserts that the Florida court has consistently applied the "polestar" *State v. Dixon* definition, and that, since a Florida jury's sentencing verdict is advisory, the rule of *Maynard v. Cartwright*, 486 U.S. 352 (1988) does not apply.

i. *State v. Dixon* is less a "polestar" than a roving planet. The state disputes this by asserting that Mr. Sochor has misrepresented to this Court the state court's rulings in *Vaught v. State*, 410 So.2d 147 (Fla. 1982) and *Pope v. State*, 441 So.2d 1073 (Fla. 1984). State's brief, page

40, n. 30. This claim is easily refuted by looking at those two cases.

In *Vaught* the court wrote at page 151:[9]

> Appellant contends that the trial court erred in finding that the killing was especially heinous, atrocious, and cruel. He argues that since the shooting was spontaneous and caused nearly instantaneous death, it cannot come within the meaning of this aggravating circumstance, which, under the interpretations given by this Court, focuses on the infliction of physical pain or mental anguish. *State v. Dixon*, 283 So.2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974); *White v. State*, 403 So.2d 331 (Fla. 1981). In response the state correctly points out that the factor heinous, atrocious, or cruel has also been approved based on the fact that a killing was inflicted in a "cold and calculating" or "execution-style" fashion. *See, e.g., Magill v. State*, 386 So.2d 1188 (Fla. 1980), *cert. denied*, 450 U.S. 927, 101 S.Ct. 1384, 67 L.Ed.2d 359 (1981); *Alvord v. State*, 322 So.2d 533 (Fla. 1975), *cert. denied*, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976); *Sullivan v. State*, 303 So.2d 632 (Fla. 1974), *cert. denied*, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976).

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[9] *Vaught* disposes of the state's suggestion at footnote 29 of its brief that the state stopped applying the heinousness circumstance to "execution-style" shootings after 1979. *See also, e.g., Harvard v. State*, 414 So.2d 1032 (Fla. 1982) (rejecting *State v. Dixon* argument), *cert. denied*, 459 U.S. 1017 (1983), and *Gaskin v. State*, 16 Fla. L. Week. S762 (Fla. Dec. 5, 1991). *Semble Walton v. State*, 547 So.2d 622 (Fla. 1989).

And in *Pope*, the court specifically disapproved of the *State v. Dixon* "conscienceless or pitiless crime which is unnecessarily torturous" construction approved in *Proffitt*:

> An especially heinous, atrocious or cruel homicide is one which is "accompanied by such additional acts as to set the crime apart from the norm of capital felonies." *State v. Dixon*, 283 So.2d at 9. This definition focuses on the manner in which the crime was accomplished – on the act itself – rather than on the perpetrator of the act. However, the definition continues, describing an especially heinous, atrocious or cruel crime as "the conscienceless or pitiless crime which is unnecessarily torturous of the victim." *Id.* While still focusing on the crime and experience of the victim, *this definition also tended to focus attention on the mindset of the murderer – his conscienceless or pitilessness.* This aspect of the aggravating factor was recognized in the jury instructions adopted by this Court in 1975.
>
> "Heinous" means extremely wicked or shockingly evil.
>
> "Atrocious" means outrageously wicked and vile.
>
> "Cruel" means designed to inflict a high degree of pain; *utter indifference to, or enjoyment of, the suffering of others; pitiless.*

Standard Jury Instructions in Criminal Cases, 78 (1975) (emphasis added). Because juries were invited to consider evidence tending to show a lack of pity, lack of remorse came to be considered relevant to the determination under this aggravating factor.

In 1981 the Supreme Court adopted a completely revised set of Standard Jury Instructions in Criminal Cases, "intended as a *definitive statement of the law* on which a trial jury is required to be instructed." *Notes on the Scope, Organization and Use of These Instructions*, Florida Standard Jury Instructions in Criminal Cases xxi (1981). The new jury instruction on finding a homicide to be especially heinous, atrocious or cruel now reads: "The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel." No further definitions of the terms are offered *nor is the defendant's mindset ever at issue*. Thus, we find any consideration of defendant's remorse extraneous to the question of whether the murder of which he was convicted was especially heinous, atrocious or cruel.

441 So.2d at 1077-78 (emphasis added). Thus we see that cases focusing on the "manner in which the crime was accomplished," such as the case at bar, rely on the "accompanied by such additional acts as to set the crime apart from the norm of capital felonies" construction rather than the *Proffitt*-approved "conscienceless or pitiless" construction.

ii. As to the contention that Florida is a judge sentencing state, the state simply ignores its own agreement as to the primacy of the jury under *Tedder* and *Grossman*. Since the state does not contend (for it cannot) that the jury instruction was constitutional, and since the state does not claim (for it cannot) that the supreme court made any effort to cure the error, reversal is necessary under *Clemons* and *Shell v. Mississippi*, 111 S.Ct. 313 (1990). Insofar as the state asserts that the supreme court

found the evidence sufficient to support the circumstance, it is clear that the supreme court was using its highly deferential standard of review. Mere sufficiency of the evidence is not enough where the court does not have, or has not applied, an acceptable construction of the circumstance. *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Maynard*.

CONCLUSION

The judgment of the Florida Supreme Court should be reversed.

Respectfully submitted,

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